FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION,
Petitioner,
v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., NEW ENGLAND COALITION ON NUCLEAR POLLUTION AND CONSOLIDATED NATIONAL INTERVENORS, INC.,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Appendix to the Petition (App.) A-1) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Does an inadequate record require that a case be remanded to an agency for further proceedings?

2. Does the National Environmental Policy Act of 1969 require federal agencies to consider all reasonably possible environmental impacts, or only a portion of those impacts?

3. May an agency insulate an inadequate record from judicial review by asserting it is exercising its technical expertise?

STATUTES AND REGULATIONS INVOLVED

The pertinent provision of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, are set forth at App. A-258-260 and A-159-160. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, is set forth in Respondents' Appendix (Resp. App.) A-10.

STATEMENT OF THE CASE

Respondents' statement of the case appears in Respondents' Brief in Opposition filed in No. 76-548.

REASONS FOR NOT GRANTING THE WRIT

This petition and the petition filed in No. 76-548 both refuse to acknowledge the salient fact about the present case: the record compiled by the Atomic Energy Commission (now the Nuclear Regulatory Commission) (the "Commission") in both the generic rulemaking proceeding and in the individual licensing proceeding involved in the present case is flagrantly inadequate. One member

of the hearing board that presided at the rulemaking found that the staff had totally failed to document its assumptions in the court proceedings in contrast to its usual practice. App. A-29-30 n. 48. The majority opinion in the court below summarized the record on the grave potential impacts of reprocessing and disposal of radioactive wastes as consisting of "extremely vague assurances by agency personnel that problems yet unsolved will be solved." App. A-38. And Judge Tamm's concurring opinion condemned the inadequacy of the record, stressing the need to avoid "reckless decisions to mortgage the future for the present, glibly assuring critics that technological advancement can be counted upon to save us from the consequences of our decision." App. A-51.

Indeed neither petition seriously disputes the Commission's failure in either the individual licensing proceeding or the legislative rulemaking to address seriously the environmental hazards posed by the creation of large amounts of radioactive wastes.

Respondents believe, therefore, that even if this Court reviewed the issues raised by petitioners, the case will inevitably have to be remanded to the Commission for further proceedings. Thus little point would be served by review by this Court at the present time. In any event, the issues raised by petitioners were correctly decided by the Court of Appeals and merely represent the application of established principles to the facts of the present case. This case, in sum, presents no occasion for review by this Court.

I. The Procedural Challenges Raised By Petitioner Rest On A Misstatement Of The Holding Below And Ignore The Substantive Basis For The Court Of Appeals Ruling.

Petitioner's major argument focuses on the Court of Appeals' discussion of alternative rulemaking procedures

and attempts to fashion this discussion into the court's holding. Thus Vermont Yankee's petition asserts:

> The Court of Appeals . . . held that the rulemaking proceeding which the Commission had on the subject was procedurally—not substantively—defective . . . .

Pet. 12.

> Nevertheless, the court held that the Commission's rulemaking proceeding insufficiently "ventilated" the issues. There is, however, no basis in law for the imposition of special procedures to achieve such a goal.

Pet. 13.

Respondents believe that this characterization of the Court of Appeals' decision misstates the basis for the holding of the court below. Contrary to petitioner's assertion, the Court of Appeals clearly held that the substantive record compiled by the Commission was woefully inadequate to sustain the rule finally adopted by the Commission. App. A-23 to A-38. And even more plainly, the court did not hold that special procedures had to be adopted for their own sake. Rather the court tied its discussion of procedure directly to the Commission's failure to generate an adequate record:

> We do not presume to intrude on the agency's province by dictating to it which, if any, of these devices it must adopt to flesh out the record. . . . Whatever techniques the Commission adopts, before it promulgates a rule limiting further consideration of waste disposal and reprocessing issues, it must in one way or another generate a record in which the factual issues are fully developed.

App. A-40 to A-41.

Respondents' full discussion of petitioner's procedural challenges to the holding below appears in Respondents' Brief in Opposition in No. 76-548.[1]

II. The Decision Below Does Not Address The Timing Of The Preparation Of An Impact Statement And Is Completely Consistent With The Decision In *Kleppe* v. *Sierra Club*.

The petitioner's contention that the Court of Appeals' holding conflicts with *Kleppe* v. *Sierra Club*, —— U.S. ——, 42 U.S.L.W. 5104 (June 28, 1976) is unsupportable. It is not altogether clear precisely how petitioner claims the decision below is inconsistent with *Kleppe*. The Petition faults the Court of Appeals' decision because the Court of Appeals "held that the Commission may not confine itself to the environmental effects of the proposal before it (i.e., the licensing of a single generating plant) but must consider the environmental effects of the entire fuel cycle." Pet. 16. But the basic issue in *Kleppe* was whether the Interior Department had a plan or proposal for regional development of the Northern Great Plains Region that required the preparation of an environmental impact statement on such a regional plan. Based on the record in that case, this Court held that the Interior Department was not considering such a plan or proposal. 44 U.S.L.W., at 5107. Therefore, in

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[1] In its Supplemental Brief, petitioner emphasizes that the Court of Appeals amended its opinion to remove reference to "the only specific procedural criticism which it made of the agency record." Petitioner's Supp. Brief, at 4. Petitioners choose to ignore, of course, that the correction was essentially trivial. The record reflects that the Hearing Board asked the Commission's only witness on waste disposal a few *pro forma* questions, Resp. App. A-1, instead of no questions, as the court's opinion originally stated. But the fault the court found with Commission's proceedings was that the record produced was inadequate, not that the Commission committed one particular procedural sin. The court's view of the record could not be affected by the presence or absence of the few questions involved in the correction of the court's opinion.

Kleppe, this Court held there was no proposed major federal action which required the preparation of an environmental impact statement pursuant to NEPA. Moreover, the Court noted that it was inappropriate for a court to intrude "on the germination process of a potential proposal" and to set the time when an EIS should be prepared. 44 U.S.L.W., at 5108.

In this case there is no question that the Commission proposed to issue an operating license for the Vermont Yankee nuclear power reactor. There is no quarrel about *what* proposed action the EIS should analyze or even *when* an impact statement should be prepared. Accordingly, *Kleppe* is not related to the issues raised by this case.

Petitioner's alleged conflict with *Kleppe* is in fact simply an argument that the Court of Appeals required the Commission to assess environmental effects which the petitioner believes should not be considered. The court below applied the unexceptionable principle that an agency's Environmental Impact Statement must weigh the direct, nonspeculative environmental consequences of a specific proposed action before the agency may proceed. *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975); *Calvert Cliffs Coordinating Committee* v. *AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1972); *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11 (8th Cir. 1973). That some of the environmental consequences of a proposed action may be separated by space or time from the proposed action is irrelevant to a determination of the scope of the impacts to be considered in the statement. As *Kleppe* itself noted, NEPA requires a "detailed" impact statement that evaluates the full environmental consequences of proposed actions. 44 U.S.L.W., at 5109. *See also Scientists' Institute for Public Information, Inc.* v. *AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *Natural Resources*

Defense Council, Inc. v. *Morton*, 458 F.2d 827 (D.C. Cir. 1973).

The issue is simply one of completeness. An impact statement must analyze all potential environmental impacts of a proposed development, not just a portion of these impacts. During its operation, a nuclear reactor will inevitably generate radioactive wastes. These wastes must be managed and disposed of, and these activities will cause significant environmental impacts. In fact, these wastes represent possibly the major environmental problem posed by nuclear power. The Court of Appeals held that an environmental impact statement on a proposal to issue an operating license to a nuclear power reactor must consider these potentially severe impacts before operation of the reactor is approved.[2] To do otherwise requires court and agency to blind themselves to these potentially major impacts. Respondents believe the decision of the court below was plainly correct. Moreover, the issue involved hardly deserves review in this Court. The environmental effects that should be included

[2] The Court of Appeals put the issue well:

> The real question posed by the Board's opinion is whether the environmental effects of the wastes produced by a nuclear reactor may be ignored in deciding whether to build it because they will later be considered when a plant is proposed to deal with them. To answer this question any way but in the negative would be to misconstrue the fundamental purpose of NEPA. Once a series of reactors is operating, it is too late to consider whether the wastes they generate should have been produced, no matter how costly and impractical reprocessing and waste disposal turn out to be; all that remain are engineering details to make the best of the situation which has been created. NEPA's purpose was to break the cycle of such incremental decision-making . . . . Decisions to license nuclear reactors which generate large amounts of toxic wastes requiring special isolation from the environment for several centuries are a paradigm of "irreversible and irretrievable commitments of resources" which must receive "detailed" analysis under § 102(2)(C)(v) of NEPA, 42 U.S.C. § 4332(2)(C)(v). App. A-11 to A-12.

in an environmental impact statement are highly dependent upon the facts and circumstances of the particular project in question. This analysis hardly involves a legal question that merits the attention of this Court.

Petitioner also argues that "the unique history of congressional regulation and oversight in the nuclear field," Pet. 16-17, should exempt from analysis under NEPA the potential environmental impacts of radioactive wastes. Respondents believe this contention is frivolous. NEPA was enacted to require federal agencies to take environmental effects into consideration in their decisionmaking as well as to ensure that the Congress and the President receive information on potential environmental impacts. If the passage of a statute sanctioning particular activities by the federal government was itself read as an indication that Congress intended no review of environmental consequences of these activities, NEPA would apply to nothing. NEPA requires all agencies to address environmental concerns in their decisionmaking. The Court of Appeals has simply applied that directive in the present case to the Commission's licensing of nuclear reactors. There is nothing remarkable about this holding, and it is not a question deserving the attention of this Court.

III. The Court Of Appeals Properly Reviewed The Administrative Record And Found It Adequate.

Petitioner argues that the court below improperly disregarded the technical judgment of the Agency. But technical judgment must rest on an adequate record. This Court has recognized that review of agency action under the arbitrary and capricious standard of Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, requires an "inquiry into the facts [which] is to be searching and careful." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971). Moreover,

Overton Park made clear that the presumption of regularity and an agency's expertise are "not to shield [its] action from a thorough, probing, in-depth review" to determine "whether the decision was based on a consideration of the relevant factors." *Id.*, at 416. Moreover, this Court has also repeatedly pointed out that

> [D]ue deference is to be rendered to agency determinations of fact, *so long as* there is substantial evidence to be found in the record as a whole.

NLRB v. *Brown*, 380 U.S. 278, 291-92 (1965) (emphasis added).

But such deference plainly is irrelevant if under either the substantial evidence test or the arbitrary and capricious standard, the record is inadequate to sustain the agency's action. In short, agency action cannot be shielded from judicial review simply by an incantation of a talismanic phrase. If no evidence exists in the record to support a particular conclusion, the agency's action cannot stand no matter how expert the decisionmaker.

Petitioner's argument, therefore, is aimed at the wrong target, since the Court of Appeals set out at such great length the inadequacies the court saw in the record. The Court of Appeals established in painstaking detail the Commission's statements for which no support existed in the record. In addition, the court canvassed the statements of the only staff witness to discuss the issue of waste disposal, carefully identifying assertion after assertion that either had no support in the record or raised questions without answering them. *See* App. A-23 to A-38.

The court noted that one member of the Commission hearing board had acknowledged that the record in the

present proceeding was woefully deficient in contrast to other Commission proceedings and normal Commission practice:

> [o]ne of the, I think, outstanding practices of the Staff has been in the past, at least as far as I can tell, to meticulously document the assumptions that are made in the discussions. I find that that has not been done here. . . .

App. A-29-30 n. 48.

Petitioner appears to contend that an agency may insulate an inadequate factual record from judicial review by a claim that the agency is exercising "technical judgment." This argument might suggest that federal agencies no longer need adequate records on which to base their decisions. The real basis for petitioner's argument, however, appears at page 19 of its petition when petitioner implies, but certainly attempts no demonstration, that the Court of Appeals' conclusion about the adequacy of the record was incorrect.

Petitioner's reluctance to attack the Court of Appeals' conclusion that the Commission's record was inadequate is understandable on two grounds. First, that conclusion is in fact unassailable. Second, the question whether the record before the Commission was adequate is hardly an issue of sufficient import to justify review in this Court.

The Commission devoted one and a half days to the hearings investigating the potential environmental impact of waste disposal—possibly the major environmental hazard posed by nuclear power. The record it made consisted of unsupported and vague assurances by one witness, despite major uncertainties and problems reflected in the record. And as petitioner points out, Pet. 19, the Court of Appeals noted in its opinion that subsequent events have already made a mockery of many assertions in the testimony of one witness that is in the record.

App. A-27 n. 46, A-33, n. 51, 52. There is simply no question here of the exercise of "technical judgment." What the Court of Appeals held was that no factual record existed on which to base technical judgment, and the Court of Appeals' extended analysis, App. A-23 to A-38, demonstrates the correctness of that conclusion.

Therefore, what the petitioner is actually asking this Court to do is to review the record of the Commission's proceeding and determine whether it was in fact adequate. Respondents respectfully submit that review of the Court of Appeals' decision on this question—particularly when the analysis of the lower court is so plainly correct—is simply not an issue deserving the attention of this Court.

CONCLUSION

For the reasons set out above and in Respondent's Brief in Opposition in No. 76-548, the Petition for a Writ of Certiorari filed in this case should be denied.

Respectfully submitted,

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